likely that he can read English, though no evidence that he cannot appears to have been adduced, and it is therefore quite possible that the accused did not know of the relevant condition in either policy. On the other hand the fact that all motor Insurance Policies are, and always have been, indemnity contracts, at any rate so far as they are concerned with damage to the assured's car, is surely widely known amongst all classes of car owners; and it is reasonably clear that the Chinese garage proprietor, who made out the two bills, knew that he was doing something he ought not to be doing. Morever, the accused refrained from offering any explanation of his conduct, either on oath or otherwise, and no evidence was called on his behalf.

In these circumstances it is not surprising that the learned Magistrate came to the conclusion that the accused and the Chinese garage proprietor had plotted together to obtain double compensation. However, there does appear to be an element of doubt as to the charge on which the accused was convicted and sentenced, and as both my learned brethren are clearly of opinion that such element of doubt is substantial enough to be reasonable, I am prepared to fall in with their view and to agree that this appeal should be allowed.

Manning, J.—The decision of this appeal depends on whether the prosecution have proved that the appellant was aware of the provisions of condition 7 in a motor car insurance policy issued by the Asia Insurance Co. The facts were that the appellant signed a form of proposal and paid the premium. A policy was then issued to him. It stated that the proposal was to be the basis of the contract but it contained a number of conditions which had not been mentioned in the proposal form. One of these was condition 7 which was to the effect that if at the time any claim arose under the policy there was any other existing insurance covering the same damage the company should not be liable to pay more than its rateable proportion of such damage. The policy was signed by an agent of the Company. It was not signed by the appellant and it was never intended that it should be signed by him. There is therefore no similarity of principle between this case and cases in which a person alleges that he did not understand the contents of a document which he has signed.

The policy contained on the outside the following notice:—

> "For your own protection you are requested to read this policy in full, including its conditions, and, if it is not in accordance with your intentions, to return it immediately for correction".

The first thing to be noted is that the appellant was not bound to read the policy. He was requested to read it in his own interest. If he did not return it within a reasonable time the company was entitled to assume that he has agreed to its terms. But no presumption arises that he did actually read it, there is an equal probability that that he did not bother to read it and relied on the company's not having inserted any conditions that might be unfair.

The way the notice might operate may be illustrated by the facts of the present case. If the company had been aware of the other insurance, it would have said to the appellant when he presented his bill for repairs, "We are paying only half of this. See condition 7 in the policy". If the appellant had denied all knowledge of this condition the company might reply "We asked you to read the policy for your own protection. If you did not read it, this was due to your own negligence and you are bound by the condition even if you were unaware of it".

On the other hand what actually happened was that the company did not know of the other insurance and paid the appellant's claim in full. The appellant was then prosecuted for cheating. The onus was on the prosecution to show that he was actually aware of condition 7. To show that he ought to have been aware of it or that he was negligent in not being aware of it was not sufficient. No presumption arose that he was aware of it and there was no direct evidence to this effect. It is not impossible that a person may honestly believe that if he has paid two premiums to two different insurance companies he is entitled to be doubly indemnified. The insertion of condition 7 in the policy shows that the company was aware of such a possibility and took occasion to provide against it.

For the above reasons I am in favour of allowing this appeal.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

CAREY, J.

January 17, 1941.

CHE DIN SULAIMAN

(Respondent)

vs.

LEE SOON PENG

(Appellant).

[PENANG CIVIL APPEAL No. 4 of 1940]

Oaths Ordinance (Cap. 15) Ss. 7 and 8—Challenge to take oath in special form.

The fact that a defendant having agreed upon challenge to take a particular form of oath afterwards retracts his agreement or does not take the oath agreed upon does not dispense with the necessity of the plaintiff producing evidence to prove his claim. It is only a circumstance by which the Judge may properly be influenced in arriving at his decision upon evidence tendered to him.

APPEAL.

T. E. Conaghan for appellant.

Respondent in person.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Carey, J.—In this suit judgment in favour of the Plaintiff-Respondent was given by the District Judge, Penang, in the following circumstances:—

> The Defendant-Appellant, having denied the Plaintiff-Respondent's claim **in toto**, the Plaintiff-Respondent challenged the Defendant-Appellant "to cut a cock's head". I take the word "challenged" to indicate that the Plaintiff-Respondent was prepared to abide by what the Defendant-Appellant swore after cutting the cock's head, though this is only a surmise on my part. Both parties agreed to this, at a certain time and place. Before the day appointed for the ceremony the Defendant-Appellant, through his lawyer, informed the District Judge by letter that he withdrew his acceptance to perform the act of cutting a cock's head, which, it would seem, though there is no proof of it in the record, constitutes part of a ceremony for taking a particular form of oath; and, in the same letter it was suggested that on the appointed day, a date should be fixed for the hearing of the case. On the appointed day the Defendant-Appellant's counsel reiterated in Court the Defendant-Appellant's withdrawal on the ground that it would be undignified for him to perform the ceremony and particularly in the Court compound. The learned District Judge thereupon stated that unless the Defendant-Appellant cut the cock's head, as agreed, judgment would be given against him. The defendant-Appellant still refused, even when, later, the District Judge suggested special arrangements for the ceremony. Judgment for the Plaintiff-Respondent was then entered with costs.

The Defendant-Appellant has appealed against the judgment on several grounds which all boil down to this:—The learned District Judge was wrong in giving judgment without any evidence being taken and recorded, merely on the ground that it is well understood that whoever makes default in taking an oath in special form loses the case.

Sections 7 and 8 of the Oaths Ordinance (Cap. 15) provide as follows:—

> "7. If any party to or witness in any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst or held binding by persons of the race or persuasion to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, cause such oath or affirmation to be tendered to him.
>
> "8.—(1) If any party to any judicial proceeding of a civil nature offers to be bound by any such oath or solemn affirmation as is mentioned in section 7 if such oath or affirmation is made by the other party to or by any witness in such proceeding, or if in any judicial proceeding of a criminal nature the accused person desires that any witness for the prosecution shall make any such oath or affirmation, the Court may, if it thinks fit, ask such party or witness or cause him to be asked whether or not he will make the oath or affirmation, but so that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.
>
> (2) If such party or witness agrees to make such oath or affirmation the Court may administer it or, if more convenient, may authorize any person to administer it and to take the evidence of the person to be sworn or affirmed and return it to the Court.
>
> (3) The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.
>
> (4) If the party or witness refuses to make such oath or solemn affirmation he shall not be compelled to make it, but the Court shall record as part of the proceedings the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it and that he refused it, together with any reason which he may assign for his refusal".

In these sections it is to be noted there is no provision dispensing with evidence.

Under the Evidence Ordinance (Cap. 13) s. 102 sub-s. 1. "Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist".

In the present or a similar case the fact that a party, having agreed to take a particular form of oath, afterwards retracts his agreement or does not take the oath agreed upon should be taken note of by the judge with the reasons, if any, put forward and he may properly be influenced thereby according to the circumstances in arriving at his decision, but I cannot see that, without even formal proof of the existence of the facts asserted, the party alleging the same can succeed on his claim based thereon, except under a special provision of the law. I am not aware of any such provision covering the present case.

The learned District Judge should have taken evidence in the suit and thereon given his judgment.

It is hereby ordered that the judgment be set aside and that the case be sent back to the District Court for hearing before another judge.

The Appellant is allowed the costs of this appeal. Those in the Court below to abide the determination of the suit and to follow the decision on the re-hearing.

Appeal allowed.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.